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No. 33.

Brf. of Raegener for Respdt. on mo.

Filed Jan. 7, 1901.

Office Supreme Court U. S.
FILED
JAN 7 1901
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 33.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN,
Respondent.

Brief for Respondent on Motion to Recall Mandate and Amend Decree.

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SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN,
Respondent.

October Term,
1900, No. 33.

BRIEF ON BEHALF OF RESPONDENT ON MOTION TO RECALL MANDATE AND AMEND DECREE.

This motion is an attempt on the part of the complainant to revive an issue originally raised by the pleadings, but never in any sense litigated in this case, and now for the first time to bring forward a claim never before seriously made, and one which the defendant had every reason to believe was abandoned.

The complainant now seeks to obtain an injunction against the bottle used by defendant. The moving papers in some degree obscure the point of the motion by referring to the bottle, capsule and label together, but the certificate of the Circuit Judge clearly shows what the petitioner really seeks.

It is true that the bill of complaint alleged the adoption of a distinctive style of bottle by complainant and asked an injunction against the use of the same by defendant; but except for the testimony of the witness Saxlehner (who, in giving a general

history of the Hunyadi business, referred in passing to the adoption of the distinctive style of bottle by his father) there is nothing in the record to show that complainant seriously claimed any exclusive rights in the bottle. There is nothing to show that the style of bottle used by Saxlehner was original with him or that his use was exclusive, or that the public attached any meaning whatever to its use by him. There is no evidence that any one was ever deceived through the use of a similar bottle either by defendant or anyone else, and all the evidence in the record is to the effect that the deception and uncertainty arose through the use of the label.

Furthermore, complainant put in evidence two bottles, "Complainant's Exhibit Franz Josef Bottle" and "Complainant's Exhibit Mattoni's Bottle" (Rec., p. 67), both of which are the same bottle as complainant's, although, as the record shows (pp. 66, 67), neither of these waters was known in this country as a "Hunyadi" water. This shows conclusively that the use of this style of bottle by complainant was not exclusive, and that it did not convey to the public any intimation that the waters contained therein were complainant's, or even that they were "Hunyadi" waters. We believe that there is no other evidence on this point in this record; but the record in the principal case against Eisner & Mendelson Co. teems with evidence to show that complainant never had any exclusive right in the shape of the bottle used by her and her predecessors. By courtesy of counsel we are permitted to refer to defendant's brief in that case, and we respectfully ask that the Court will consider it in this case also.

The decree of the Circuit Court was drawn by complainant's solicitors, and was signed without change and without objection on the part of defendant. That decree does not in any way award an injunction against the use of the bottle, although

nothing in the opinion of the Circuit Judge prohibited complainant asking such an injunction if she then deemed herself at all entitled thereto. On the Appeal to the Circuit Court of Appeals no reference whatever was made to the bottle, and no error was assigned for failure to grant an injunction against the bottle. The ninth assignment of error is altogether too general to cover this point, and complainant should not now be heard to raise a point on such general assignment of errors which was not fairly raised in the Court below, and in regard to which no ruling was there asked.

Ansbro vs. U. S., 159 U. S., 695, 698.

The opinion of this Court in this case does not in any way suggest that the use of the bottle by defendant should be enjoined, and specifically directs that the decree of the Circuit Court herein be reinstated. The mandate directed accordingly. We submit that this is in accordance with the intention of this Court. Upon the facts as established by this record, the defendant has the absolute right, in connection with the sale of genuine Hungarian bitter waters, to use the bottle which by long custom has become associated with Hungarian bitter waters generally. The laws of Hungary, where his water is bottled, give him this right, and it would amount to a practical destruction of his business to compel him to re-bottle it here.

It is respectfully represented that the decision and mandate of the Court herein give complainant all the relief that she is entitled to and need no correction.

Respectfully submitted,

LOUIS C. RAEGENER,
Of Counsel for Defendant.